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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY OF DELTA AIR LINES INC. TO REPLY OF
LAKE CENTRAL AIR LINES INC.

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December 1, 1960

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Delta Air Lines, Inc., ("Delta"), hereby responds to the Reply Brief filed in No. 493, by Lake Central Airlines, Inc. ("Lake Central") and prays that this Court will deny the Petition for Writ of Certiorari.

I.

In its Reply (p. 4) to Delta's Brief in Opposition, Lake Central in part relies for the first time upon a conflict between the Ninth and the District of Columbia Circuits in *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board* (9th Cir. 1953), 205 F. 2d 449 and *Outland*

et al. v. Civil Aeronautics Board (D.C. Cir. 1960), No. 15,489, decided October 27, 1960, but not yet reported. The alleged conflict does in fact exist. *But its existence is completely irrelevant here.*

Both of the cited cases involved a question which is totally distinct from the one raised in this proceeding. Those two cases concerned a question of procedure—what is the proper time for seeking judicial review of a Civil Aeronautics Board (“CAB” or the “Board”) decision—whereas this case is concerned with a substantive question respecting the CAB’s basic statutory power.¹

Moreover, as the Court noted in the *Outland* decision, the conflict between jurisdictions on the procedural problem involved in that case has existed for years, with the Ninth Circuit standing alone (see *Lake Central Reply*, pp. 2-3). The conflict has created no practical problem. *Outland* neither changed the law nor created the conflict. The situation, therefore, is the same now as it was when *Lake Central* filed its Petition in this proceeding *without* citing or relying upon the existence of the irrelevant conflict between Circuits over the separate and different procedural problem.

Finally, neither *Lake Central’s* Petition in No. 493 nor the related Petition of the CAB in No. 492, seek to bring before this Court either the *Consolidated Flowers* or *Outland* case, or the problems resolved in those cases.

¹ The D. C. Circuit in the *Outland* decision “joins” the 5th Circuit in *Waterman v. Civil Aeronautics Board* (5th Cir. 1947), 159 F. 2d 828, *rev’d on other grounds sub nom. Chicago and Southern Airlines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103 (1948), in rejecting the position of the 9th Circuit in the *Consolidated Flowers Case* (*Lake Central Reply*, p. 3). The *Waterman* case was cited by *Lake Central* in its Petition, and *Delta* already has distinguished it from the present proceeding (*Delta’s Brief in Opposition*, pp. 19-20). Clearly, then, on the irrelevant procedural point *Outland* is merely cumulative, and adds nothing to *Lake Central’s* cause.

For all of the foregoing reasons, Lake Central cannot seek support for its Petition here in the unrelated conflict between those two cases.

II.

Lake Central now also relies upon an alleged conflict between *Outland* and the decision below. As already seen, however, the two cases involve wholly *different* questions, with the result that no actual conflict even could exist.

Lake Central cites the District of Columbia Circuit's language in *Outland*, that when a petition for rehearing is in fact filed with the CAB "... there is no final action until the rehearing is denied" (Lake Central Reply, p. 3). This, Lake Central contends, "controverts" a Delta contention supposedly approved in this case by the Court below, to the effect that a proceeding terminates when the new certificates issued in that proceeding become effective. The error with this argument is that the foregoing is *not* a Delta contention; Lake Central apparently does not understand either Delta's position or the ruling of the Court below.

The decision below has no bearing whatsoever upon the agency's power to commence or terminate a proceeding as it deems best—nor, we might add, upon its power to fix and thereafter extend the effective date of a new certificate as desired. The decision below *does* hold—because Congress decreed that it shall be so—that once the CAB does make a new certificate effective, the agency thereupon loses power to withdraw any part of that particular certificate except by following procedures laid down in the statute by Congress. But this holding does not mean that the administrative proceeding itself is thereby terminated.¹

¹ For example, as was requested in various of the petitions for reconsideration involving the agency proceeding below in

More important, perhaps, insofar as its consistency with the *Outland* case is concerned, the decision below has no bearing whatever upon the time for appeal of a CAB decision, nor does it in any manner affect either the power of an appropriate Court to act on appeal or the power of the agency to fulfill any judicial mandate which may issue. The decision below merely enforces particular limitations which Congress has imposed upon the CAB's power to withdraw certificate authority after a certificate has gone into effect.

Conversely, the decision in *Outland* with respect to the proper time for a party to file for judicial review in a situation where petitions for reconsideration are still pending before the agency, in no manner turns upon or even discusses the statutory limitations which are involved in this case concerning the agency's basic powers.

The two cases clearly are not in conflict either in result or in reasoning. The decision below does rule that under the provisions of the statute, once a new certificate has become effective the agency is allowed to act only in a certain manner upon pending petitions for reconsideration which are addressed to those portions of the agency decision which granted that new certificate; but the time at which such action is to be taken is still within the agency's control, and the agency therefore still determines the proper time for an appeal to the Courts under the procedural rules laid down in *Outland*. To repeat, *Outland* merely deals with questions of procedure, while the decision below rules upon an entirely separate problem respecting the substantive power of the agency. There is not, and could not be, any conflict between *Outland* and this case.

this case, after a new certificate's effective date the Board still could grant additional new certificate authority in the same proceeding, to the same airline or to other parties, for which provision was not made in the original opinion.

III.

One other aspect of Lake Central's Reply must be answered. Without citation or quotation, the carrier states (Reply, pp. 4-5) that prior to the time Delta filed the petition for review in this case, Delta had taken an inconsistent position in another proceeding before the CAB with respect to the agency's power to "reconsider" an effective certificate. In that other proceeding, Lake Central alleges, Delta "relied" upon the CAB's power to grant Delta additional authority over and above that contained in the certificate which had been issued to Delta in this proceeding, which additional authority Delta had requested in a petition of its own for reconsideration of the agency's original decision. Lake Central contends that this "reliance" took place "several months" after Delta's certificate had become effective. Delta must point out that these assertions do *not* reveal the "undisputed fact," that Lake Central flatly alleges (Reply, p. 4), but to the contrary *are grossly misleading*.

As Lake Central itself points out, Delta's petition to the agency for reconsideration requested *new* authority which up to that time had been withheld—an entirely different situation than the one involved here, where a petition requested *withdrawal* of permanent, effective, and *already implemented* route authority. But aside from that fact, and as Lake Central well knows, Delta's citation, in the other administrative proceedings, to Delta's petition for reconsideration in this case was directed to establishing Delta's long-standing interest in the provision of service in the market to which the petition and the other proceeding were both addressed, and no argument was made concerning the Board's power to act on petitions after certificates have become effective.

Lake Central's attempt to spin an inconsistency out of such a situation shows the lengths to which the carrier

is forced to go in an effort to construct alleged conflict and to obtain another hearing concerning the issues *properly* resolved in the decision of the Court below.

IV.

For the reasons set forth above and in its Brief in Opposition, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue.

Respectfully submitted,

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